

No. 76-1491

Supreme Court, U. S.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1976

ANTHONY M. NATELLI,

*Petitioner,*

v.

UNITED STATES OF AMERICA

**SUPPLEMENTAL BRIEF  
IN SUPPORT OF PETITION  
FOR A WRIT OF CERTIORARI**

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Pursuant to Rule 24(5) of the Rules of this Court, petitioner submits this supplemental brief to bring to this Court's attention the applicability to his pending petition of this Court's recent decision in *Blackledge v. Allison*, No. 75-1693, decided May 2, 1977.

In the petition filed on April 27, 1977, petitioner is seeking review of a judgment affirming the denial without evidentiary hearing of his motion for relief under 28 U.S.C. §2255. Petitioner's §2255 motion sought relief on the ground, *inter alia*, that critical statements made by the prosecutor to the jury were shown to be inaccurate and misleading by sworn testimony of a government witness in a subsequent prosecution. The court of appeals affirmed the summary denial of petitioner's motion, observing that petitioner "assumes, of course, that [the witness'] testimony was accurate." App. A, p. 5a. The court below, however, impermissibly went to the other extreme and assumed

that this subsequent testimony relied upon by petitioner was not accurate.

As argued in Point II of the petition, the denial of petitioner's §2255 motion without an evidentiary hearing was patently improper under this Court's decisions in *Fontaine v. United States*, 411 U.S. 213 (1973), and *Machibroda v. United States*, 368 U.S. 487 (1962), since an allegation of prosecutorial misstatement, if established at an evidentiary hearing, would clearly have entitled petitioner to a reversal of his conviction.

In its recent decision in *Blackledge v. Allison*, *supra*, this Court has reaffirmed the holdings of *Machibroda* and *Fontaine* and again repeated the overriding principle that contested factual issues cannot be resolved against a §2255 movant summarily. Yet this was precisely the error committed by the court below when it assumed away the credibility of testimony by a government witness in a trial subsequent to petitioner's merely because that witness had a prior conviction. In *Blackledge v. Allison*, summary disposition was held improper even though the §2255 motion was contradicted by "[s]olemn declarations in open court [which] carry a strong presumption of verity." Slip op. at 10. Petitioner, in contrast, presented the sworn testimony of a government witness in support of his §2255 motion.

In *Blackledge* this Court observed that under the newly promulgated rules governing collateral proceedings affidavits may be submitted in opposition to a §2255 motion but emphasized that "[w]hen the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive . . . ." <sup>1</sup> In petitioner's case, no affidavits were submitted in opposition to the motion. Neither the district judge—who had no prior connection with the case—nor the court of appeals had any evidentiary basis to discount the testimony. Both courts

<sup>1</sup> Slip op. at 19 n.25, quoting Advisory Committee Notes to Rule 7, Rules Governing Habeas Corpus Proceedings, quoting *Raines v. United States*, 423 F.2d 526, 530 (4th Cir. 1970).

simply assumed that the sworn testimony of the government witness was "at best questionable." App. A, p. 6a.<sup>2</sup>

The transcript of testimony adduced by the government at a later related prosecution established a "strong presumption of verity" against government efforts to disclaim the accuracy of the testimony, and certainly precluded summary rejection of the testimony. If the government wishes to impeach the accuracy of the testimony it forecasted and adduced at the subsequent trial, then there is clearly a "genuine issue of fact to be resolved by the District Court." *Blackledge v. Allison*, slip op. at 17.

Accordingly, the petition should be granted and the judgment summarily reversed on the authority of *Blackledge v. Allison*.

Respectfully submitted.

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May 12, 1977

<sup>2</sup> In *Blackledge*, the Court noted that, although §2255 and federal habeas corpus are to be "exactly commensurate" remedies, they may be "administered in a somewhat different fashion" because a §2255 motion is normally referred to the original sentencing judge whose personal "recollection of the events may enable him summarily to dismiss a §2255 motion . . ." Slip op. at 10 n.4. In the present case, however, the judge who had presided at petitioner's trial had resigned from the bench in the interim, and the §2255 motion was referred to a district judge who had no other contact with either petitioner's trial or with the subsequent related trial at which the testimony forming the basis for the motion was given.